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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.202(b)	)	MM Docket No. 99-322
Table of Allotments	)	RM-9762
FM Broadcast Stations	)	
(Chillicothe and Ashville, Ohio)	)	

TO: The Commission

REPLY TO OPPOSITION TO APPLICATION FOR REVIEW

1. Franklin Communications, Inc., North American Broadcasting Co., and WCLT Radio Incorporated (collectively, the "Joint Petitioners"), hereby reply to the Opposition of Clear Channel Broadcasting Licensees, Inc. ("Clear Channel") relative to the Joint Petitioners' Application for Review in the above-captioned proceeding.

2. In its sparse Opposition, Clear Channel makes three points, none of them valid, particularly in the factual setting presented here

3 First, Clear Channel asserts that multiple ownership compliance issues should be addressed in the context of the implementing application, not at the allotment stage Opposition at 3-4. The Joint Petitioners agree that, in some limited situations, prudence might dictate that consideration of multiple ownership questions be deferred – BUT this is not such a situation. Deferral may be appropriate where there exist other variables which might, subsequent to the channel reallotment but before the implementing application, eliminate any potential ownership questions. But here there are no such variables. Indeed, Clear Channel has, in its modification application (File No. BPH-20031112AIA) filed two weeks after the Bureau's decision on review

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here, completely eliminated any possible doubt about the ultimate use to which the reallotted channel will be put

4. From Clear Channel's application, we know for certain that Clear Channel intends to move the transmitter for the channel in question to a site immediately proximate to Columbus – just as the Joint Petitioners have predicted for years. Of course, throughout the rule making proceeding the proponent of the reallotment repeatedly scoffed at the Joint Petitioners' charge that precisely such a relocation would occur Instead, the proponent labeled Joint Petitioners' charge as "purely speculative", strongly suggesting that that charge was baseless. Now that we, and the Commission, know for sure that the channel will be moved up into Columbus – and, therefore, that the Joint Petitioners have been right all along – it is impossible to ignore that fact in the continuing consideration of whether the reallotment was in the public interest. [1]

5 Clear Channel's insistence that the Commission defer consideration of multiple ownership questions smacks of the classic shell game, where the pea is hidden and shuffled beneath one of three constantly moving shells until the hapless participant loses track of it in the blur. Clear Channel would have the Commission focus on one proceeding while ignoring others,

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[1] In view of the fact that, throughout this proceeding, the reallotment proponent maintained the charade that no site change was anticipated, the fact that that position has now been abandoned warrants detailed reconsideration of the reallotment. The reallotment proponent repeatedly touted the reallotment because, supposedly, no existing short-spacings would be affected and, supposedly, there would be no increase in the potential for interference between currently short-spaced stations – because no change in transmitter site was being proposed *See, e.g* , Petition for Rule Making, filed April 26, 1999 at 2, Supplement to Comments Filed In Support of Notice of Proposed Rule Making, filed June 14, 2002 at 5. Indeed, it was through that assertion that the proponent sought to avoid the prohibition against allotment proposals which do not meet all minimum separation requirements *See Report and Order*, 17 FCC Rcd 20418, 20419 (Audio Division 2002) at ¶3. But as Clear Channel's relocation application makes clear, existing short-spacings ***will*** be affected and increased interference ***is*** possible, if not certain. As a result, Clear Channel's proposed relocation of the channel's site plainly eviscerates the assertions made in support of the reallotment, assertions on which the Bureau appears to have relied. The proposed relocation thus undermines the validity of the resulting reallotment decision.

presumably hoping that the core issue is never fully addressed in any of the proceedings. But the Commission need not play the game Rather, the Commission can and should consolidate consideration of this rule making ***and*** Clear Channel's pending modification application.

6. In the course of urging the Commission to play the shell game, Clear Channel advances its second argument, urging that, in the allotment rule making (as opposed to the site modification application), the Commission "must focus on the distribution of local service and whether the subject community is deserving of such service." Opposition at 3. In so doing, Clear Channel belittles the Joint Petitioners for daring to observe that the notion of "local service" so central to Clear Channel's position is nothing but smoke and mirrors.

7. Here Clear Channel is enacting a modern-day version of "The Emperor's New Clothes".

8 As the Joint Petitioners have demonstrated repeatedly, the notion of "local service" has been drained of any regulatory substance over more than 20 years of deregulation. While the Commission may refer to the supposed importance of "local service" from time to time, that term is not defined anywhere in the rules or elsewhere and is not the subject of any regulatory requirement. Moreover, the Commission has expressly abandoned any regulatory mechanisms by which "local service", however it might ultimately be defined, could be measured and assessed Indeed, through its repeated deregulatory actions the Commission has signaled to the industry that "local" has no real meaning. [2]

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[2] How else to explain, for example, the fact that ***any*** station's main studio – whose placement in the community of license was long held out as a *sine qua non* of "localism" – may now be located, without prior approval, up to 25 miles away from the community of license, while the main studios of some stations may be located as much as 75 miles or more away? What does that say about the Commission's concept of "local"?

9 So when the Commission purports to don the elaborate raiment of "local service", it is in fact donning nothing at all, just like the emperor. And when Clear Channel refers to the supposed importance of "local service", it is ignoring the meaninglessness of that term, much as the courtiers and townspeople pretended to ignore the emperor's nakedness.

10. The Joint Petitioners have repeatedly demonstrated that the concept of "local service", from a regulatory perspective, is meaningless When Clear Channel characterizes the Joint Petitioners' concern about that point as "inexplicable", Opposition at n. 10, Clear Channel is again choosing to blind itself to the obvious, perhaps because the obvious is not helpful to Clear Channel's cause. After all, it is Clear Channel which continues to intone the mantra of "local service" as an essential aspect of the allotment process which led to the result below. So if "local service" really is a substanceless illusion, Clear Channel's justification for the result below evaporates

11. Of course, the Joint Petitioners have expressly invited the Bureau and/or Clear Channel to offer some proof that the Joint Petitioners' assessment of the regulatory status of "local service" is wrong. Presumably, if we have missed some rule or some policy or some decision in which "local service" is defined and in which some specific requirement concerning "local service" is imposed, it would be a simple matter to bring that oversight to our attention. To date, however, neither the Bureau nor Clear Channel has done so.

12 In its third and final argument, Clear Channel turns conventional administrative law on its head by claiming that the Bureau, which is normally subordinate to the full Commission, may casually ignore clear direction from the Commission. As the Joint Petitioners demonstrated in their Application for Review, the Commission has made clear that, notwithstanding the stay issued by the U.S. Court of Appeals for the Third Circuit, *see Order* in

Prometheus Radio Project v FCC, No. 03-3388 (3rd Cir.), filed September 3, 2003, the Commission continues to stand by its determination that the "old" ownership rules were ***not*** in the public interest while its "new" ownership rules ***are*** in the public interest. In the Commission's view, it would not be in the public interest to act in a manner which would not comply with the "new" rules. *Shareholders of Hispanic Broadcasting Corporation*, FCC 03-218, released September 22, 2003, at 6-7, ¶11.

13. Clear Channel responds by pointing out that the Bureau had announced, on September 10, 2003, a policy under which the "new" rules would be ignored. According to Clear Channel, the Bureau could therefore permissibly ignore the contrary policy announced by the full Commission two weeks later (on September 22) Opposition at 4. The Joint Petitioners are aware of no principle of administrative law which would permit a subordinate official (here, the Bureau) simply to ignore policy statements made by a superior authority (here, the full Commission).

14 Clear Channel seems to suggest that the Commission's decision was limited to the very specific context of "a single extremely large, multiple market, hotly contested, and politically sensitive transaction." Opposition at 4. But the Commission did not limit itself in that manner. Rather, the Commission said that,

> [h]aving found the previous methodology for defining radio markets not to be in the public interest, ***we believe it would not be in the public interest to grant an application that would not comply with the radio multiple ownership rule once the new methodology is applied***. Absent the ability to condition upon compliance with our new rules, we would exercise our discretion not to act on the applications until the new rules become effective.

Shareholders of Hispanic Broadcasting Corporation supra at 6-7, ¶11 (emphasis added). Nothing there about the size of the transaction, or the number of markets involved, or the ardor of the litigants, or the politically sensitive nature of the deal.

15. Moreover, the supposed bases for distinction asserted by Clear Channel do not validly distinguish that case from this one. The instant case, by its very nature, involves "multiple markets" (Chillicothe v. Columbus), and it certainly has been "hotly contested" – so those features do not distinguish the two cases. While the instant case may not be "politically sensitive" in the same way as was the *Hispanic Broadcasting Corporation* matter, that should make no difference at all It would be highly inappropriate for an agency to tailor the applicability of its policies based on the political sensitivity of the cases before it. Of course, if the Commission really intended, as Clear Channel suggests, to stick to its "public interest" guns only in "politically sensitive" cases, we encourage the Commission to so state so that the record is clear. And finally, while the *Hispanic Broadcasting Corporation* case did involve a plethora of stations, the multiple ownership violations on which the Commission focused involved only two markets (Houston/Galveston and Albuquerque). It is difficult to believe that the Commission could conclude that the public interest could not tolerate a possible violation of the "new" ownership rules in those two markets, but would tolerate an essentially identical violation in the Columbus market. But again, if that is indeed a line which the Commission wishes to draw, it can and should say so expressly.

16. In closing, and in light of Clear Channel's effort to wrap itself in the self-righteous – albeit non-existent – cloak of "local service", the Joint Petitioners believe it appropriate to call the Commission's attention to the following quotation attributed to the Chief Executive Officer of Clear Channel in an article published in the Columbus Dispatch on December 31, 2003:

> If anyone said [Clear Channel] w[as] in the radio business, it wouldn't be someone from our company. We're not in the business of providing news and information. . . We're simply in the business of selling our customers products.

See Attachment A hereto. Not surprisingly – and consistent with that statement – the website of the station (the call sign of which was recently changed to WLZT) proudly proclaims that "Columbus' favorite songs are back again!", but makes no reference to Ashville as far as we could tell Even the link on that site to "local" news merely leads to a page in which the content is provided by commonly-owned WTVN(AM), a Columbus station. *See* Attachment B hereto (images of the website obtained on January 14, 2004). Even if "local service" were still a valid decisional tool, the Commission should be reluctant to wield that particular tool for Clear Channel's benefit since, notwithstanding the pleasant face Clear Channel presents to the Commission here, it would appear that Clear Channel's actual devotion to public service is doubtful.

Respectfully submitted,

/s/ Harry F. Cole
Harry F. Cole

/s/ Lee G. Petro
Lee G. Petro

Fletcher, Heald & Hildreth, P.L.C.
1300 N. 17th Street - 11th Floor
Arlington, Virginia 22209
(703) 812-0400

/s/ Margaret L. Tobey
Margaret L. Tobey

Morrison & Foerster, LLP
2000 Pennsylvania Avenue, N.W. - Suite 5500
Washington, D.C. 20006-1888
(202) 887-6935

Counsel for Franklin Communications, Inc , North American Broadcasting Co and WCLT Radio Inc.

January 14, 2004

ATTACHMENT A

Heavy hitter moves in with its version of 'lite'

By Tim Feran
THE COLUMBUS DISPATCH

A new "lite-rock" station is in town, with a familiar voice in the morning.

WFCB (93.3 FM) has switched from continuous Christmas songs to a new format — much of it similar to what airs on WSNY (94.7 FM), long the dominant station among female listeners.

And on Jan. 8, WFCB — "the New 93.3 Lite-FM" — will present Columbus radio veteran Shawn Ireland as its morning host.

"We researched the market to determine . . . what was not already available to Columbus radio listeners," said Tom Thon, regional vice president of Clear Channel Communications, which owns WFCB.

"We are what our name is: a light adult-contemporary radio station. To the best of our knowledge, that gives us a unique position in the market."

WFCB is in the midst of playing 5,000 songs to acquaint listeners with its new format, which features artists such as James Taylor, Carole King, the Temptations, Elton John, the Carpenters, Chicago, Neil Diamond, Rita Coolidge, Carly Simon and the Beach Boys.

"I've got great confidence in (Program Director) Steve Granato, who is extremely experienced in the adult-contemporary format," Thon said

WFCB's new morning host was a longtime member of the morning team at fellow Clear Channel station WNCI (97.9 FM). Ireland left WNCI in May and showed up at Clear Channel's country station WCOL (92.3 FM) in September as an evening host. Many observers had theorized that another morning show was in Ireland's future.

Dixie Lee, formerly a morning host at WCOL, will return to the airwaves as Ireland's replacement on the 7 p.m.-to-midnight show at WCOL.

The WFCB changes are only the latest as Clear Channel has transformed the station from a small-town operation into one serving the Columbus metro area, a strategy known in radio as a "move-in."

WFCB, at one time based in Chillicothe, petitioned the Federal Communications Commission in 2002 to move its antenna to Ashville from west of Circleville. That made it effectively a Columbus station.

Several companies and organizations protested that Clear Channel, in its quest for profits, would stop serving a smaller community and flout anti-monopoly regulations.

They argued that Clear Channel, which owns more than 1,200 stations and is the nation's and Ohio's largest radio company, already owns five Columbus stations that are the area's leading earners of radio ad revenue, raking in more than 30 percent of the market's roughly $95 million pot.

But the FCC accepted Clear Channel's reasoning — that WFCB's new location would reach underserved listeners without depriving others — and allowed the move.

All six stations that Clear Channel owns in the Columbus market will move to one building in January. The new studios for WNCI, WCOL-FM, WFCB, WTVN (610 AM), WFJX (105.7 FM) and WCOL (1230 AM) will feature state-of-the-art digital engineering, Thon said.

"The company has invested significantly in Columbus radio."

WFCB shares elements of its format with WSNY, which has been Wisconsin-based Saga Communications' biggest money-earning station for years, and WSNY's sister station, oldies WODB (107.9 FM).

"I welcome the competition, and it's not even direct competition," WSNY General Manager Alan Goodman said. "But we work awfully hard here to provide a quality local station. Chillicothe, as a result of their (Clear Channel officials') avarice and greed, is deprived of one.

"The real shame is they were a great, local Chillicothe station. . . . They epitomized what was beautiful about local radio.

"Who loses ultimately? It's the consumer."

Such objections are likely to fall on deaf ears at Clear Channel's headquarters in Texas. Lowry Mays, chief executive officer of Clear Channel, told *Fortune* magazine in March that he cares only about advertising, not programming, at his stations.

"If anyone said we were in the radio business, it wouldn't be someone from our company," Mays said in the article. "We're not in the business of providing news and information. We're not in the business of providing well-researched music. We're simply in the business of selling our customers products."

tferan@dispatch.com

ATTACHMENT B


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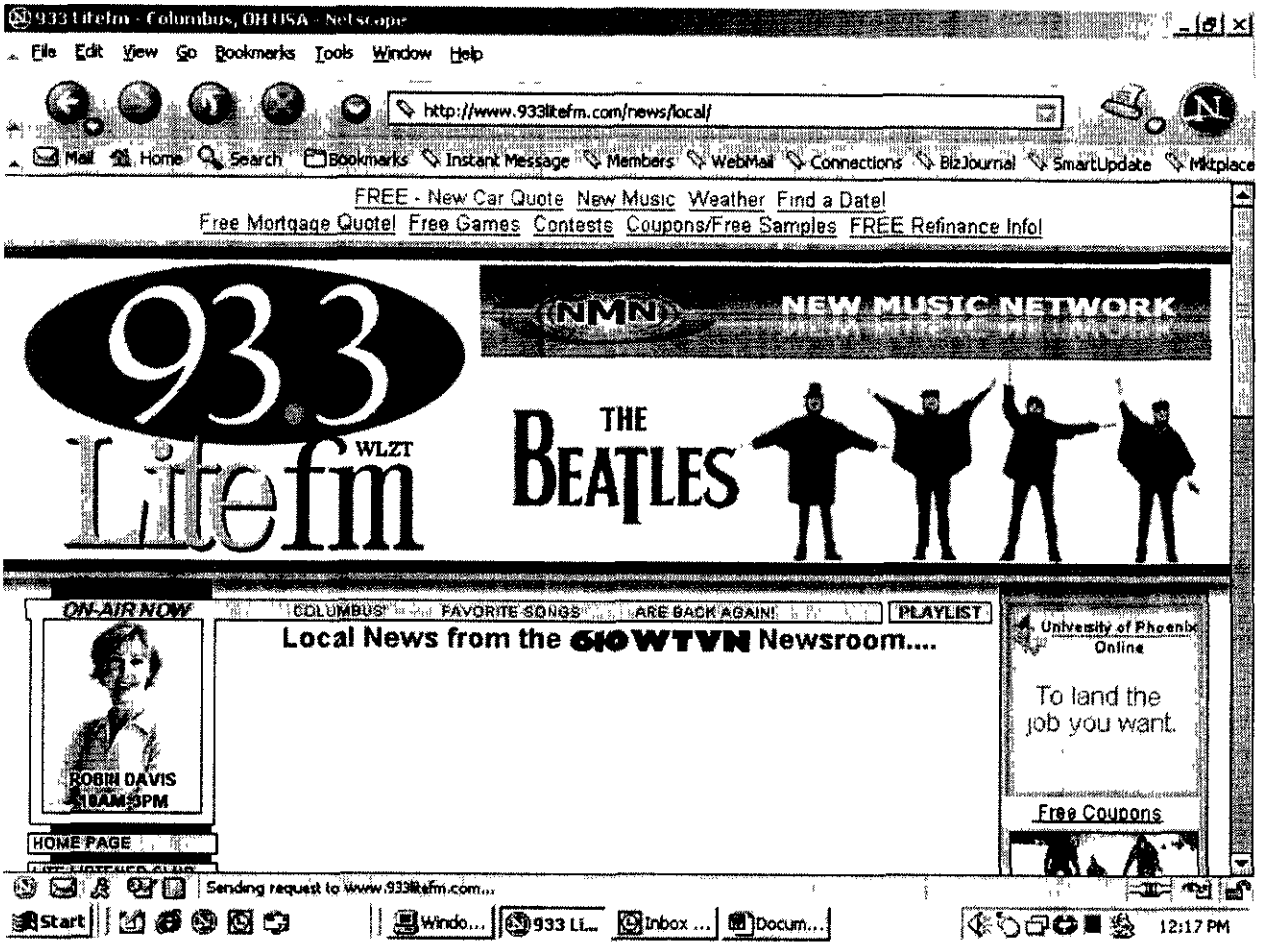
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THE BEATLES
ON-AIR NOW
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CERTIFICATE OF SERVICE

I, Harry F. Cole, hereby certify that on this 14th day of January, 2004, I caused copies of the foregoing "Reply to Opposition to Application for Review" to be placed in the U.S. Postal Service, first class postage prepaid, or hand delivered (as indicated below), addressed to the following persons:

Peter Doyle, Chief
Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
(BY HAND)

Robert Hayne, Esquire
Audio Division
Media Bureau
Federal Communications Commission
445 12th Street, S.W., Room 7-C485
Washington, D.C. 20554
(BY HAND)

Marissa G. Repp, Esquire
Hogan & Hartson L.L.P.
555 13th Street, N.W.
Washington, D.C. 20004-1109
Counsel for Clear Channel Broadcasting Licenses, Inc.

Gregory L. Masters, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
Counsel for Clear Channel Broadcasting Licenses, Inc.

Margaret L. Tobey, Esquire
Morrison & Foerster LLP
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006

/s/ Harry F. Cole
Harry F. Cole